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IN THE

Supreme Court of the United States

October Term, 1965
No. 991

PETER WYLAN,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court for the County of Los Angeles, State of California.

JURISDICTIONAL STATEMENT.

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PETER WYLAN,

Appellant,

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On Appeal From the Appellate Department of the Superior Court for the County of Los Angeles, State of California.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles entered on September 17, 1965, in which said court affirmed the judgment of the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California entered on April 8, 1965. The Appellate Department of the Superior Court of the State of California for the County of Los Angeles is the highest state court in which a decision could be had.[1]

[1]Rule 63, California Rules of Court, WEST'S ANNOTATED CALIFORNIA CODES, Vol. 23, Part 1. The Appellate Department of the Superior Court refused to certify the present

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that a substantial question is presented.

Opinion Below.

No written opinion was rendered by either the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, or the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Jurisdiction.

This is an appeal from a conviction arising under California Penal Code section 650½. On April 8, 1965, a judgment of conviction was entered in the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California.

On September 17, 1965, the Appellate Department of the Superior Court of the State of California entered an order affirming the judgment of the Municipal Court of Pasadena Judicial District, County of Los Angeles, State of California.

On September 28, 1965, the Appellate Department of the Superior Court of the State of California, for the County of Los Angeles entered an order denying appellant's petition for rehearing or, in the alternative, for certification of cause to the District Court of Appeal.

On December 13, 1965, appellant filed in the Appellate Department of the Superior Court of the State

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case for hearing to the District Court of Appeal, which it had the power to do under this particular rule.

of California for the County of Los Angeles his Notice of Appeal to this Court.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The following decision sustains the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Adamson v. California*, 332 U.S. 46, 48 (1947).

Statute Involved.

California Penal Code section 650½, as pertinent to this case, provides as follows:[2]

> "A person who wilfully and wrongfully commits any act . . . which seriously disturbs or endangers the public peace or health or which openly outrages public decency . . . for which no other punishment is expressly provided by this Code, is guilty of a misdemeanor."

Question Presented.

Whether appellant's conviction of the violation of California Penal Code Section 650½ is void because said penal provision on its face and as applied to appellant is so vague and indefinite that the penalty prescribed for its violation constitutes a denial of liberty and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

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[2]The full text of California Penal Code section 650½ is provided in Appendix A hereof.

Statement of Case.

Appellant was charged in two separate complaints with two counts in violation of California Penal Code, Section 650½ and two counts in violation of California Penal Code, Section 314(1) (indecent exposure). Specifically, as to the violations of Penal Code Section 650½, the complaints charged that on or about a particular day, the appellant did wilfully and unlawfully and wrongfully commit an act which seriously disturbed and endangered the public peace and health and which openly outraged public decency in violation of the aforementioned section of the Penal Code.[3]

After trial by court on a plea of not guilty, appellant was found guilty of two violations of California Penal Code Section 650½ and found not guilty on the indecent exposure counts.

The facts are undisputed, as the evidence presented on trial consisted solely of three police reports admitted into evidence by stipulation.[4] In the main, the reports alleged three female patients had complained of seductive acts by appellant, a dentist, during the course of treatment.[5] Appellant at all times remained fully clothed, and none of the women made any complaint to appellant when the incidents occurred.

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[3]The full text of the original and amended complaint in Case No. M69629 and the original complaint in Case No. M69946 have been made a part of the Clerk's Transcript.

[4]The full text of each of these police reports is contained in the Settled Statement on Appeal, which has been made a part of the Clerk's Transcript.

[5]Although the police reports contained complaints by three female patients, the appellant was convicted of activities concerning only two of them.

How the Federal Question Is Presented.

At all stages of the proceedings, appellant continually and constantly attacked Penal Code Section 650½ as being unconstitutionally vague. Before entering a plea in the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, appellant opposed both complaints on the ground, among others, that Penal Code Section 650½ was unconstitutionally vague.[6] His objections were overruled without written opinion.

Additionally, the question of the vagueness of Penal Code Section 650½ was raised at all stages of the appeal to the Appellate Department of the Superior Court for the County of Los Angeles, State of California. In all instances, appellant's argument was rejected without written opinion.

The Question Presented Is Substantial.

In *Musser v. Utah,* 333 U.S. 95 (1947), this Court held that a substantial federal question was raised by a state statute making it a crime to conspire:

> "To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or due administration of the laws."

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[6]The constitutional objections of appellant before trial are contained in his Demurrer to Amended Complaint, Memorandum of Points and Authorities in Support of Demurrer and in Opposition to Motion to Consolidate, and Supplemental Memorandum of Points and Authorities, all of which have been included in the Clerk's Transcript.

The Court noted the broadness of the statutory language and said:

> "Standing by itself, it would seem to be a warrant for conviction for agreement to do almost any act which a judge or a jury might find at that moment contrary to his or its notions of what was good health, morals, trade, commerce, justice or order." 333 U.S. at 97.

On remand, the Utah Supreme Court, which had not previously passed upon the precise question, struck down the statute as violating the Fourteenth Amendment because of vagueness and uncertainty.[7]

Recently, in *Graccio v. Pennsylvania,* 34 LAW WEEK 4099 (1966), this Court stated:

> "It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as *'misconduct'* or *'reprehensible conduct.'* If used in a statute . . . such loose and unlimiting terms would certainly fail to measure up to the requirements of the Due Process Clause." (Emphasis added.)

1. In the case at bar, the appellant has been charged with violating those provisions of California Penal Code Section 650½ which prohibit the doing of an act "which seriously disturbs or endangers the public peace or health, or which openly outrages public decency."[8] It is submitted that this language of California Penal Code Section 650½ is nothing less than a license to con-

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[7] *State v. Musser,* 118 Utah 537, 223 P. 2d 193 (1950).

[8] Original and amended complaint, Case No. M69629; the original complaint, Case No. M69946.

vict when the trier of fact does not approve of a defendant's conduct. The statute gives no fair warning of what is prohibited or proscribed.[9] Rather, the statute allows conviction in the unguided discretion of arresting officers, judges and juries.[10] There are no guideposts whatsoever as to what specific conduct may be deemed to seriously disturb and endanger the public peace and health, or as to what type of conduct will openly outrage public decency.

2. This is not a situation in which the broad language of the statute has been limited by judicial determination. There are no California cases which by judicial construction narrow or restrict the language of Penal Code Section 650½. On the contrary, the statute is intended to operate as a catch-all, for in the statute's final clause, it is provided that the acts therein condemned shall be misdemeanors provided only that the conduct involved is not somewhere else specifically punishable under the Penal Code.[11] Therefore, from the language of the statute itself, it becomes clear that the obvious purpose of the statute is to punish any unacceptable behavior which is not otherwise specifically

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[9] *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

[10] *Shuttlesworth v. Birmingham*, 15 L. Ed. 2d 176 (1965).

[11] See *People v. Proctor*, 46 Cal. 2d 481, 296 P. 2d 821 (1956). One other California case construing the statute follows the *Proctor* case in holding that a defendant cannot be convicted under section 650½ if his conduct violates some other provision of the California Penal Code. *People v. Hunter*, 208 Cal. App. 2d 633, 25 Cal. Rptr. 492 (1962). Dicta in *People v. Hensel*, 233 Cal. App. 2d 834, 43 Cal. Rptr. 865 (1965), that section 650½ involves "the element of publicity." But appellant's argument in the courts below that since the acts charged took place in the privacy of a dental office, he had not outraged "public" decency were rejected. There are no other reported California cases construing the language in section 650½ under which appellant was convicted.

prohibited by the California Penal Code. Thus, any behavior, no matter in what sphere, if slightly extraordinary, unusual, different or deviant, is rendered criminal if found to be distasteful to the trier of fact. The situation is closely analogous to the unfettered authority granted to juries in the statute struck down in *Graccio v. Pennsylvania,* 34 LAW WEEK 4099 (1966). The vagueness of the catch-all statute involved in this case is much more serious than that in *Graccio.* There, the unfettered decision of a jury that the defendant had done something reprehensible resulted only in a judgment for costs; here, the same kind of decision results in criminal conviction. Moreover, it is the kind of criminal conviction which may have the most serious consequences. Appellant earns his livelihood as a dentist. If this conviction stands, he will be subject to proceedings to revoke his license on the ground that he has been convicted of a crime involving moral turpitude.[12]

3. The catch-all use of this statute is made patently clear in the case at bar. In the field of sexual behavior, the California legislature, because of its broad consideration of the subject, has been held to have preempted the field, and thus, local governments may not regulate sexual behavior.[13] Despite such broad legislative consideration, the alleged acts of appellant do not run afoul of any specific California criminal statute dealing with sexual behavior. Indeed, as to the specific charges against this appellant, namely, violation of California Penal Code Section 314(1) (indecent exposure), the appellant was found not guilty.[14] Nonetheless,

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[12]California Business and Professions Code, Section 1679.

[13]*In re Carole Lane,* 58 Cal. 2d 99, 22 Cal. Rptr. 857 (1962).

[14]See original and amended complaint, Case No. M69629, and original complaint, M69946, which are a part of the Clerk's Transcript.

though there was no violation of any specific penal provision, this appellant, as does every California defendant charged under Section 650½, finds himself in a situation where his conduct, though not specifically criminal, is nonetheless subject to an obscure moral review by the trier of fact.

4. The validity of the statute has considerable importance beyond this case. The number of Californians being convicted for violations of Penal Code Section 650½ is indeed alarming. Though no statistics are kept for such misdemeanor offenses, counsel for appellant have personally checked the records of the 110 North Grand Avenue branch of the Los Angeles Municipal Court (one of twenty-three municipal courts in Los Angeles County) for the month of November, 1965 and have found that 76 complaints were filed alleging violation of Section 650½ of the Penal Code. In these 76 cases there were: 55 convictions to date under Section 650½; 11 complaints still pending trial; 9 complaints resulting in convictions under another section of the Penal Code; 1 complaint dismissed in the interests of Justice.[15] Additionally, not only are Californians faced daily with such vague and uncertain laws, but so, also, are the citizens of South Dakota, North Dakota, Oklahoma and New York.[16] By contrast, the citizens of

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[15]The records checked for the complaints filed were from the original Index for November, 1965 for this courthouse alone. In addition to this Index, 26 other indices are kept at other municipal courts throughout the Los Angeles area.

[16]The statutes of these four states are reproduced in Appendices B, C, D and E, respectively. In Oklahoma and New York, the statutory language has been somewhat qualified by judicial decision. As to Oklahoma, see *Gunn v. Territory*, 19 Okla. 240, 91 Pac. 861 (1907); *Rachel v. State* and *Vinson v. State*, 71 Okla. Cr. Rep. 33, 107 P. 2d 813 (1940). As to New York, see *People*

Utah and those of Indiana have been relieved from the threats of such omnipotent legislation in that the Supreme Courts of those states have held that statutes comparable to California Penal Code Section 650½ are void for vagueness.[17]

5. The federal question presented by this appeal is substantial and requires the plenary consideration of this Court for several reasons. First, the courts below have upheld the kind of catch-all criminal statute outlawed, under the Due Process Clause of the Fourteenth Amendment, by decisions of this Court in the *Musser* and *Graccio* cases. Second, the statute involved not only affects thousands of Californians each year, but the citizens of other states as well. While statutes of this type have been declared void in two states, similar statutes remain in effect in at least four states other than California. Third, and most important, the statute involved represents all the vices of the vaguest criminal statutes. Not only are those charged with its violation not given fair warning that their conduct runs afoul of the criminal law, not only are those charged given no basis on which to prepare a defense, but policemen, prosecutors, judges and juries are authorized to punish conduct on no basis more substantial than that they find the conduct reprehensible. This is the substance of a government of men, not of law.

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v. Superintendent of N.Y.S.R. for Women, 21 N.Y.S. 2d 653 (1940); *People v. Stevens*, 74 N.Y.S. 2d 346 (1947) and *People v. Burke, et al.*, 267 N.Y. 571, 196 N.E. 585 (1935).

[17] *State v. Musser*, 118 Utah 537, 223 P. 2d (1950); *Jennings v. State*, 16 Ind. Rep. 335 (1861).

Conclusion.

It is most earnestly submitted that for the foregoing reasons, the questions presented by this appeal are substantial and should be reviewed.

Respectfully submitted,

RONALD H. BONAPARTE and
DAVID A. BINDER,
By RONALD H. BONAPARTE,
Attorneys for Appellant.

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APPENDIX A.

§650½. *Injuries to Persons, Property, Public Peace, Health or Decency; False Personation for Lewd Purpose.*—A person who willfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, or who willfully and wrongfully in any manner, verbal or written, uses another's name for accomplishing lewd or licentious purposes, whether such purposes are accomplished or not, or who willfully and wrongfully uses another's name in any manner that will affe or have a tendency to affect the moral reputation of the person whose name is used generally, or in the estimation of the person or persons to whom it is so used, or who with intent of accomplishing any lewd or licentious purpose, whether such purpose is accomplished or not, personifies any person other than himself, or who causes or procures any other person of persons to identify him, or to give assurance that he is any other person than himself to aid or assist him to accomplish any lewd or licentious purpose, for which no other punishment is expressly prescribed by this code, is guilty of a misdemeanor.

APPENDIX B.

Criminal Law of South Dakota, Section 13.1701.

§13.1701. *General provisions: offenses not specifically designated.* Every person who willfully and wrongfully commits any act which openly outrages public decency and is injurious to public morals, although no punishment is expressly provided therefor is guilty of a misdemeanor.

APPENDIX C.

Criminal Law of North Dakota, Section 12-22-01.

§12-22-01. *Injury to public decency and morals—Misdemeanor.*—Every person who willfully and wrongfully commits any act which openly outrages public decency and is injurious to public morals, although no punishment is expressly prescribed therefor, is guilty of a misdemeanor.

APPENDIX D.

Oklahoma Penal Code, §22.

§22. *Gross injuries—Grossly disturbing peace—Openly outraging public decency—*

Injurious acts not expressly forbidden:

Every person who willfully and wrongfully commits any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages public decency, and is injurious to public morals, although no punishment is expressly prescribed therefor by this Code, is guilty of a misdemeanor. R.L.1910, § 2793.

APPENDIX E.

New York Penal Code, §43.

§43. *Penalty for acts for which no punishment is expressly prescribed.*

A person who wilfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, for which no other punishment is expressly

prescribed by this chapter, is guilty of a misdemeanor; but nothing in this chapter contained shall be so construed as to prevent any person from demanding an increase of wages, or from assembling and using all lawful means to induce employers to pay such wages to all persons employed by them, as shall be a just and fair compensation for services rendered.

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APPENDIX F.

In the Appellate Department of the Superior Court of the State of California for the County of Los Angeles Superior Court No. CR A 6356, Trial Court No. M 69269.

People of the State of California, Plaintiff and Respondent, vs. Peter Wylan, Defendant and Appellant.

Filed: Sep. 17, 1965. William G. Sharp, County Clerk. J. MacGregor By J. MacGregor, Deputy.

On Appeal from the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California. John F. Hassler, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the order granting probation (referred to as "judgment" in notice of appeal) made and entered in the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

By the Court. September 17, 1965.

Aiso *Presiding Judge,* Breitenbach, *Judge.* Weisman *Judge.*

APPENDIX G.

In the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, Superior Court No. CR A 6357, Trial Court No. M 69946.

People of the State of California, Plaintiff and Respondent, vs. Peter Wylan, Defendant and Appellant.

Filed: Sep. 17, 1965. William G. Sharp, County Clerk. J. MacGregor By J. MacGregor, Deputy.

On Appeal from the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California. John F. Hassler, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

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By the Court. September 17, 1965.

Aiso *Presiding Judge.* Breitenbach, *Judge.* Weisman, *Judge.*

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